UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

NICOLLETTE PINKHAM, Personal Representative for JAMES S. PINKHAM,[1]	***)***	
Plaintiff	***)***	
v.	***)***	***Docket No. 03-116-B-W***
JO ANNE B. BARNHART, Commissioner of Social Security,	***)***	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[2]

This Social Security Disability ("SSD") appeal raises the questions whether the administrative law judge (i) appropriately evaluated the medical and vocational evidence, (ii) should have further developed the record and (iii) appropriately evaluated the claimant's credibility and allegations of pain. I recommend that the commissioner's decision be vacated.[3]

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[1] James S. Pinkham, referred to as the claimant throughout this report and recommended decision, died on May 15, 2003, after the Appeals Council issued its decision on his application for benefits. Nicollette Pinkham, referred to here as the plaintiff, brings this appeal as the personal representative of his estate.

[2] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the claimant has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires a plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available in the Clerk's Office. Oral argument was held before me on February 25, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

[3] On February 20, 2004 counsel for the plaintiff filed a motion for remand for consideration of additional evidence, the claimant's death certificate, dated May 23, 2003. Motion to Remand (Docket No. 10) & Exh. A. At oral argument, counsel for the commissioner objected to the motion as untimely. The deadline for filing motions for remand was February 5, 2004, as counsel for the plaintiff was informed by notice on January 16, 2004. Docket No. 8. The death certificate was available (*continued on next page*)

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the claimant was insured for benefits only through December 31, 1999, Finding 1, Record at 20; that he had an impairment or combination of impairments (degenerative disc disease and valvular heart disease or other stenotic defects, *id*. at 17) that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, *id*. at 20; that his allegations regarding his limitations were not totally credible, Finding 5, *id*.; that he had the residual functional capacity to lift and/or carry ten pounds frequently and twenty pounds occasionally, to stand and/or walk about six hours total in an 8-hour work day, and to sit about six hours total in an 8-hour work day, but could only occasionally perform postural functions, Finding 7, *id*.; that the claimant was unable to perform his past relevant work, Finding 8, *id*.; that given his age (younger individual between the ages of 45 and 49), education (high school or equivalent), lack of transferable skills and residual functional capacity to perform a significant range of light and sedentary work, use of Rule 202.21 found in Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework for decision-making resulted in a conclusion that there were a significant number of jobs in the national economy that the claimant could perform, Findings 9-13, *id*. at 20-21; and that the claimant therefore was not under a disability as that term is defined in the Social Security Act through the date last insured of December 31, 1999, Finding 14, *id*. at 20. The Appeals Council declined to review the decision, *id*. at 4-6, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

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to the plaintiff nine months before the motion deadline. Counsel for the plaintiff admitted at oral argument that there was no excusable neglect involved in the delay in filing the motion. I strike the motion as untimely.

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The claimant first contends that the finding that he had a residual functional capacity for light work is inconsistent with the medical evidence in the record. Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 7) at 2-7. Contrary to the claimant's contention, *id*. at 6, the administrative law judge did not "disregard" the medical evidence from the claimant's treating physicians, nor are his observations at pages 14-15 of the record "not material," *id*. The administrative law judge cites portions of the medical records that support a light RFC, particularly the report of a consultant, Christopher Smith, M.D., who examined the claimant on January 8, 2002, and the evaluations by state agency consultants. Record at 15,

17. While there may well be medical evidence that would be inconsistent with an RFC for light work,[4] it remains the role of the administrative law judge to choose between conflicting evidence. So long as there is substantial evidence to support his conclusion, it must stand. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991).

The plaintiff next asserts that the record "lack[s] . . . any valid supporting vocational evidence," Statement of Errors at 7, apparently because she contends that the administrative law judge was required to include in his hypothetical question to the vocational expert all of the limitations claimed by the claimant in his testimony, *id*. at 8-9. However, the administrative law judge's discussion of the medical evidence and the claimant's assertions concerning his limitations demonstrates the administrative law judge's reasons for rejecting that testimony. Record at 16-18. *See Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 554 (1st Cir. 1978). Nothing further was required under the circumstances.

The next argument pressed by the plaintiff concerns the administrative law judge's treatment of the medical evidence provided by the claimant's treating physicians. Statement of Errors at 10-14. She refers specifically only to the records of Alfredo Monsivais, M.D., in this regard. *Id*. at 10-12. However, contrary to the plaintiff's assertion, Dr. Monsivais's report did not "determine" that any activities "restrict[] Mr. Pinkham's work capacity." *Id*. at 11-12. The only conclusions set forth in the report are that the claimant had "[l]ow back pain with muscular ligamentous strain with the findings of the x-rays, the possibility of discogenic disease should be considered," and the claimant was advised to obtain further evaluation and treatment. Record at 142. None of this is necessarily inconsistent with the findings of the administrative law

[4] Contrary to the claimant's argument, Itemized Statement at 7, none of the symptoms he lists are necessarily inconsistent with an RFC for light work.

judge. Accordingly, there was no need for the administrative law judge to determine whether Dr. Monsivais's opinion should be given controlling weight under 20 C.F.R. § 404.1527(d).

The plaintiff also contends that the administrative law judge "failed to properly develop the record," Statement of Errors at 14, but at oral argument counsel for the plaintiff was unable to identify anything in the administrative record that suggested that the administrative law judge did not understand why any of the treating physicians reached their conclusions or to specify any of their records that contained conflicts or ambiguities that must be resolved, lacked necessary information, or otherwise did not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. $ 404.1512(e)(1). Nor did he identify any gaps in the information provided in these reports necessary to a reasoned evaluation of the claim. *Heggarty v. Sullivan*, 947 F.2d 990, 997 (1st Cir. 1991). The plaintiff has failed to show that any further development of the record was required. *See Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5-6 (1st Cir. 1991).

The plaintiff next contends that the record does not support the administrative law judge's finding with respect to the claimant's credibility. Statement of Errors at 16-19. She complains that "the ALJ selectively cites some of the claimant's statements to his physicians concerning his impairments and their impact on his ability to work." *Id*. at 16. So long as the administrative law judge's conclusion is supported by the evidence he "selects" from the record, his conclusion will stand. Here, the administrative law judge found that "the claimant's allegations regarding his limitations are not totally credible for the reasons set forth in the body of the decision." Record at 20. The plaintiff does not specify which limitations about which the claimant testified were wrongly determined to be less than credible, but she asserts that the credibility finding is "significant because the VE expressly testified that if Mr. Pinkham's testimony was treated as credible and relied upon, there would be no work that he could perform." Statement of Errors at 17. When asked to

assume all of the restrictions to which the claimant testified, the vocational expert agreed with the administrative law judge that those restrictions "would prevent him from doing . . . all work." Record at 41. Contrary to the position of the plaintiff, the administrative law judge in this instance did not "simply refuse to believe uncontradicted testimony," Statement of Errors at 17, nor did he limit his discussion of his reasons for rejecting the claimant's testimony on this point to a conclusory assertion that it was inconsistent with other evidence of record, *id*. at 18. For example, the administrative law judge noted that the claimant "conceded to an ability to perform substantial physical activity" in reports to examining physicians, and sets forth that evidence in some detail. Record at 17-18. The opinion complies with Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003), at 133-42.

For similar reasons, the administrative law judge's evaluation of the claimant's allegations of pain, challenged by the plaintiff because "there was no competing evidence showing that the pain from Mr. Pinkham's objectively established medical problems was not sufficient to impose limitations on RFC beyond those found by the ALJ," Statement of Errors at 19, was in fact adequate. The claimant's entire testimony about pain was very brief. He testified that in 1998 his "back finally got so bad that I wasn't able to perform any jobs," Record at 29, that in October 1997 he had "severe back — I couldn't even get out of bed," *id*. at 30, that at the time of the hearing he did not "really get much exercise. Pain's too much to —," *id*. at 33, and that he had "chest pains very often," *id*. at 34. The plaintiff's statement of the legal test is in error. The commissioner does not need to find that there is evidence showing that the pain about which a claimant testifies is "not sufficient to impose limitations on RFC beyond those" she finds to exist, but rather to base her findings on this issue on sufficient evidence in the record. At oral argument, counsel for the plaintiff contended that the administrative law judge's evaluation of the claimant's testimony concerning pain was insufficient because he did not mention the fact that the drug Darvocet or its equivalent was prescribed

for the plaintiff, nor did the opinion discuss the side effects of that drug. In the absence of any testimony about side effects or any citation to any entry in the medical records showing that the claimant suffered from any adverse side effects, there was no need for the administrative law judge to speculate about them. It is not apparent from the record that the fact that medication for pain was prescribed for the claimant would affect the evaluation made by the administrative law judge in this case in any significant way. The administrative law judge's evaluation of the plaintiff's testimony concerning pain in this case complied with 20 C.F.R. § 404.1529(c).

The final issue raised by the plaintiff concerns the finding by the Veterans' Administration that the claimant was totally disabled. Statement of Errors at 3, 4, 7, 12, 13-14. While a determination by another government agency that a claimant is disabled is not binding on the commissioner, 20 C.F.R. § 404.1504, every federal court of appeals that has considered the issue has held that a determination of disability made by the Veterans' Administration is entitled to some weight in determining a claim for Social Security benefits, *McCartey v. Massanari*, 298 F.3d 1072, 1075 (9th Cir. 2002) (listing nine other circuits); *Chambliss v. Massanari*, 269 F.3d 520, 522 (5th Cir. 2001). In this case, the decision refers to the Veterans' Administration decision as follows: "The VA found him non-service connected disabled and he receives a pension." Record at 16.[5] As one court has noted specifically in this regard, "[a] passing reference to another agency's disability finding or a perfunctory rejection of it will not suffice." *Richter v. Chater*, 900 F. Supp. 1531, 1539 (D. Kan. 1995). In that case, as in this one, there was no indication of what weight was given to the Veterans' Administration's disability determination, or even that it was considered at all. Counsel for the commissioner contended at oral argument that the administrative law judge's two

[5] The opinion also notes that "the claimant was evaluated at the Veterans Administration Medical Center, Togus, Maine (*continued on next page*)

references to the Veterans' Administration determination constituted sufficient consideration, particularly because an opinion that a claimant is disabled is not entitled to any specific weight in a Social Security proceeding. The regulation governing medical opinions on issues reserved to the commissioner in fact states only that such an opinion "does not mean that we will determine that you are disabled." 20 C.F.R. § 404. 1527(e)(1). This regulation was in effect when the courts cited above concluded that some weight must be given to a determination of disability by the Veterans' Administration. The failure of the administrative law judge to do so in this case requires remand.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

for the purpose of establishing disability. . . . The claimant was found entitled to a nonservice-connected pension due to 40% anterior osteophyte L1, L2 and L3 with mild narrowing of L4-5 and L5-S1." Record at 14.

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